[2020] PBRA 182

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Application for Reconsideration by Narman

Application

1. This is an application by Narman (the Applicant) for reconsideration of a decision, not to direct release. The decision was made on 28 October 2020 by a Parole Board panel consisting of two independent members, a judicial member and a psychology member.

2. Rule 28(1) of the Parole Board Rules 2019 provides that applications for reconsideration may be made in eligible cases either on the basis (a) that the decision is irrational and/or (b) that it is procedurally unfair.

3. I have considered the application on the papers these are; the oral hearing decision, a document entitled 'Reconsideration Submissions' submitted by the Applicant's legal adviser and the dossier consisting of 734 Pages

Background

4. The Applicant was sentenced to imprisonment for public protection on 10 December 2010. The sentence was imposed in relation to sexual offences; specifically, an offence against a male child aged under 13 and offences against two elderly women. The Applicant was sentenced to a minimum period of 8 years imprisonment, his tariff expired on 8 October 2017.

5. The oral hearing panel considered a referral from the Secretary of State to consider whether it would be appropriate to direct the release of the Applicant or to recommend that he progress to open prison conditions

Request for Reconsideration

6. The application for reconsideration is dated 5 November 2020. The application was not made on the published Reconsideration Application form (CPD 2), which contains guidance notes to help prospective applicants ensure their reasons are challenging the decision of the panel are well grounded and focused. The document explains how to look for evidence to sustain the complaints and reminds applicants how being unhappy with the decision is not in itself grounds for reconsideration. However, that does not mean that the application was not validly made.

7. The grounds for seeking a reconsideration are as follows:

(a) That the panel inappropriately took account of alleged further offences;
(b) That the panel inappropriately adopted a test for release which was applied by the Offender Manager;
(c) That the panel incorrectly concluded that the Applicant was not open and honest; and
(d) That the panel placed overreliance on the seriousness of the index offences rather than his progression, in assessing risk.

Current parole review

8. The oral hearing panel was considering a second review. The panel noted that it had considered a dossier of 708 pages and heard evidence from the Applicant's Prison Offender Manager, Community Offender Manager, an Interventions facilitator, and from the Applicant. The Applicant's solicitor made written submissions to the oral hearing panel. The hearing was heard remotely in light of the current Covid restrictions.

The Relevant Law

9. The panel correctly set out in its decision letter the test for release and the issues to be addressed in making a recommendation to the Secretary of State for a progressive move to open conditions.

Parole Board Rules 2019

10. Pursuant to Rule 28(1) of the Parole Board Rules 2019 the only kind of decision which is eligible for reconsideration is a decision that the prisoner is or is not suitable for release on licence. Such a decision is eligible for reconsideration whether it is made by a paper panel (Rule 19(1)(a) or (b)) or by an oral hearing panel after an oral hearing (Rule 25(1)) or by an oral hearing panel which makes the decision on the papers (Rule 21(7)).

Irrationality

11. In **R (DSD and others) v the Parole Board [2018] EWHC 694 (Admin)**, the Divisional Court set out the test for irrationality to be applied in judicial reviews of Parole Board decisions. It said at para. 116,

    "the issue is whether the release decision was so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

12. This test was set out by Lord Diplock in **CCSU v Minister for the Civil Service [1985] AC 374**. The Divisional Court in **DSD** went on to indicate that in deciding whether a decision of the Parole Board was irrational, due deference had to be given to the expertise of the Parole Board in making decisions relating to parole. The Board, when considering whether or not to direct a reconsideration, will adopt the same high standard for establishing 'irrationality'. The fact that Rule 28 contains the same adjective as is used in judicial review shows that the same test is to be applied.

13. The application of this test has been confirmed in previous decisions on applications for reconsideration under rule 28 see (for example) Preston **[2019] PBRA 1** and others.

Procedural unfairness

14. Procedural unfairness was not argued in this case

The reply on behalf of the Secretary of State

15. The Secretary of State has made no representations in response to this application for reconsideration.

Discussion

Alleged further Offences

16. In their oral hearing decision under heading 3 (Analysis of Offending), the panel adopted the words contained in an earlier Parole Board decision of 2019 to describe the index offences. This was entirely appropriate and consistent with practice. The adopted text described the index offences then continued as follows:

> *'[The Applicant was] candid in telling the panel that [he had] engaged in unreported offending, robbery and burglary, with [his] peers, usually fulfilling the role of a driver. While [the Applicant's] friends' motivations may have been for financial reasons, [his] appear to have been for reasons to do with thrill-seeking and loyalty though [he] told the PSR author that [he] derived some financial benefit from engaging in criminal activity. This demonstrates breadth and diversity in your convicted and unconvicted offending to include sexual, violent and general offending.*

17. In analysing the conclusion of the 2019 panel, the (2020) Panel said in its decision letter

> *'This panel thought that the evidence of non-convicted offending, and a tendency to minimisation of the detail of [the Applicant's] convicted offending, suggested a capacity for being less than fully candid, and could be of concern regarding the manageability of [his] risks, should [he] be released. Following a discussion about [the Applicant's] need to 'have sex every day', the current panel was not convinced by [his] account of how [he] met this need and considered it was possible that [he] may also have engaged in other non-consensual sex or sexual offending with other victims beyond those for which [he has] been convicted. They could not rule out the possibility that this is may have included offences against other victim groups, for example females, [the Applicant's] own age or other vulnerable people who did not speak up. However, there is no evidence of this, and [he] strongly denied it. The panel considered carefully whether this would alter their assessment of risk and decided that it should be considered alongside the other evidence of extreme minimisation.'*

18. It is this analysis which forms the base of the Applicant's first head of complaint.

19. Taking the analysis in detail, the panel indicate that '*evidence of non-convicted offending'… 'suggest a capacity for being less than candid'*. This comment is unexplained and difficult, on the face of it to understand. Without further explanation - the acceptance of offending beyond conviction, by an offender, would appear to demonstrate candidness rather than the opposite (on the basis that the evidence came from the Applicant himself).

20. The 2020 panel then continue with the analysis and appear to have concluded that a '*need to have sex every day'* was a basis for concluding that there was a possibility that the Applicant had engaged in non-consensual sex with other victim groups, although, as the panel noted, there was '*no evidence'* of this.

21. Having indicated that there was a possibility (and added that there was 'no evidence ') the panel then concluded that this possibility '*should be considered alongside the other evidence of extreme minimisation'*

22. In essence the panel appear to have concluded that a speculative possibility of the Applicant having committed additional (undetected) sexual offences with no evidence base should be included in their risk assessment.

The Relevant Law

23. In **DSD** (cited above) court said as follows (at p155)

> *155. '……whereas we agree ….. that it is not the role of the Parole Board to determine whether a prisoner had committed other offences, we cannot accept the extension of that submission,……. that it is precluded from considering evidence of wider offending when determining the issue of risk. The distinction between these formulations is important, not least because it was occasionally obscured during the course of Ms Kaufmann's argument. It was, however, very clearly drawn at the beginning of her submissions in reply. As for Mr Collins's submission that the distinction between taking account of evidence of wider offending and refraining from making determinations about it is artificial, we cannot agree: it is important. At the risk of repetition, in the circumstances of the present case, this evidence or material could have been used as a means of probing and testing the honesty and veracity of Mr Radford's account.*

24. It was made clear in that case that Parole Board panels not only have a right, but indeed a duty to consider the potential of '*wider offending'* if it impacts on risk. It was also made clear that the offending may not (as in **DSD**) have necessarily been concluded by a conviction.

25. In **DSD** the issue was whether the panel had gathered sufficient appropriate material upon which to reach a decision on risk. However, the principal of the appropriateness of a decision on risk being supported by unconvicted material was established.

26. A Parole Board panel relying upon evidence of behaviour outside the parameters of conviction must exercise care. My determination is that there must be an evidence base upon which any conclusion is reached. For example, in cases of domestic violence, evidence might be callouts, cases dropped at an early stage, observations by witnesses, injuries recorded etc; in cases of sexual or other violence, police reports, witness statements, evidence of injuries may all be sufficient to establish an evidential base.

27. Once established, the panel must scrutinise the available evidence, taking careful account of denials or alternative explanations. The panel may then be in a position to reach a definitive conclusion as to the quality and reliability of the evidence base and whether it is safe and fair to rely upon it in assessing risk. In **DSD** the court indicated that:

    '*In our judgment, this material would have provided a sound platform for testing and probing Mr Radford's account, either at a pre-hearing interview by a member of the panel or at the hearing itself. The psychologists would also have been asked to reconsider their assessments in the light of it.'*

28. In this Applicant's case, the panel accepted that there was '*no evidence'* to support a conclusion that the Applicant had engaged in non-consensual sexual behaviour with vulnerable people. Once a panel has concluded that there is no evidence it would, in my determination, be clearly unfair and inappropriate to rely upon it.

29. Based upon the Applicants own evidence, it would have been reasonable to conclude, that the Applicant, to meet his needs, was engaged in frequent sexual encounters. There was, however, no basis to conclude that those encounters were non – consensual and possibly involved vulnerable people and therefore raised risk.

30. Reliance upon the evidence of minimisation was a fundamental factor in the decision of the panel. The panel concluded that the '*possibility'* that non-consensual offences had been committed '*should be considered alongside the other evidence of extreme minimisation'*. In my determination it was irrational to base any assessment of risk upon this conclusion. There was no evidence that the Applicant had committed undetected non-consensual sexual offences, and thus no behaviour which could be said to have been minimised.

31. I therefore conclude that this matter should be reconsidered by a fresh panel.

32. In the light of my findings in respect of this head of the appeal. It is not necessary for me to reach any definitive conclusion upon the remaining complaints.

Decision

33. Accordingly, I do find there to have been an irrational conclusion. I do so solely for the reasons set out above. The application for reconsideration is therefore granted and the case should be reviewed by a fresh panel by way of an oral hearing.

Directions

34. I have given careful consideration to whether this case should be reconsidered by the original panel or whether it should be considered afresh by another panel.

35. I have no doubt that the original panel would be fully capable of approaching the matter conscientiously and fairly. However, the question of justice being seen to be done arises again. If the original panel were to adhere to its previous decision, there would inevitably be room for suspicion that it had simply been reluctant to admit that its original decision was wrong. However inaccurate or unfair that suspicion might be, it would be preferable to avoid it by directing (as I now do) that the case should be reheard by a fresh panel.

36. The following further directions are now made:

(a) The re-hearing should be expedited.
(b) The original decision must be removed from the dossier and must not be seen by the new panel.
(c) The new panel should be told that this is a reconsideration but not made aware of the reasons why it was ordered.
(d) The new panel should also be advised that the fact that this is a reconsideration should not in any way affect their decision. It is a complete re-hearing.

HH S Dawson
17 November 2020